Supreme Court, U.S.
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No. 02-1123

In the
Supreme Court of the United States

Immigration and Naturalization Service,
Petitioner,

v.

Ranjit Singh,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Under the Immigration and Naturalization Act of 1994, an alien may have his *in absentia* deportation order reopened if he can show that he missed his adjustment-of status hearing because of "exceptional circumstances." The question in this case is whether the United States Court of Appeals erred when it held that the Board of Immigration Appeals ("BIA") was required to consider the totality of the circumstances of the particular case in

determining whether such circumstances existed including the fact that the Immigration Judge ("IJ") would have had no choice but to grant the application if the alien had appeared. As will be shown, the court did not err. And even if it did, the case does not merit this court's attention because despite the Immigration and Naturalization Service's parade of horribles the decision is narrow and will apply to very few cases.

Statement

Respondent Ranjit Singh, a native and citizen of India, entered the United States without inspection in July 1990. Petitioner's Appendix, 1a, 10a. On May 23, 1993, he married Harpreet Kaur, a lawful permanent resident. A.R. 56. On December 7, 1993 before deportation proceedings began his visa petition was approved. Respondent's App., A1; A.R. 45. On October 7, 1994, the I.N.S. began deportation proceedings against Singh by filing an Order to Show Cause alleging that he was deportable because he entered without inspection. Petitioner's

App. 10a. Singh's wife became a naturalized U.S. citizen on April 21, 1997 (A.R. 44); shortly thereafter, on June 11, 1997, Singh filed an application for adjustment of status to lawful permanent resident, based on his approved visa application and his wife's citizenship. See Petitioner's App, 2a; A.R. 39 43. A hearing was scheduled on that application for October 16, 1997, at 1:00 p.m. A.R. 74, 85. That hearing was then rescheduled for January 21, 1998, at 11:00 a.m., and Singh was given written notice of the new date and time. Petitioner's App., 10a, 18a 23a.

When Singh failed to appear at the hearing, he was ordered deported *in absentia* under 8 U.S.C. § 1252b(c)(1) (1994), as he learned when he, his wife, and his newborn child appeared at his attorney's office at 12:00 p.m. to prepare for what he mistakenly thought was a 1:00 p.m. hearing. See Petitioner's App. 1a. Two months later, Singh filed a motion to re-open the deportation proceedings. Petitioner's App. 10a. This was well within the 180-day time limit on motions to re-open permitted under

the INA. See 8 U.S.C. § 1252b(c)(3)(A) (1994).

The IJ denied Singh's motion on April 21, 1998, finding that he had not demonstrated the "exceptional circumstances" required for a motion to reopen an *in absentia* deportation order. Petitioner's App. 9a-13a; see 8 U.S.C. § 1252b(f)(2) (1994). The BIA affirmed in a cursory, per curiam opinion. Petitioner's App. 6a 8a. The court of appeals reversed the BIA's decision, holding that it had abused its discretion by not considering *all* of the relevant circumstances surrounding Singh's failure to appear, including the certainty that he had no reason to absent himself because his application for adjustment of status would have been granted. *Singh v. INS*, 295 F.3d 1037 (9th Cir. 2002); Petitioner's App., 1a-5a.

Reasons for denying the Petition for Certiorari

1. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rules of the Supreme

Court, Rule 10. Here, the INS argues at most that the court of appeals misapplied the properly stated statutes and rules of law governing motions to reopen *in absentia* deportation orders. Thus, the court expressly recognized that it had to review the BIA's decision for an abuse of discretion. Petitioner's App. 2a; *Sharma v. INS*, 89 F.3d 545, 547 (9th Cir. 1996); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1187 (9th Cir. 2001) (en banc). The court also correctly recognized that it had to reverse the BIA's denial of a motion to reopen if it was "arbitrary, irrational, or *contrary to law*." Petitioner's App., 2a (emphasis added); *Ahwazi v. INS*, 751 F.2d 1120, 1122 (9th Cir. 1985). Whether the BIA correctly interpreted the INA i.e., whether the denial is contrary to law is a purely legal question, which the court reviews de novo. *Socop-Gonzalez*, at 1187; *Lopez v. INS*, 184 F.3d 1097, 1099 (9th Cir. 1999). Finally, the court accurately cited the correct statutory standards governing such motions to reopen: 8 U.S.C. § 1252b (c)(3)(A) (1994) and 8 U.S.C. § 1252b(f)(2) ("'Exceptional circumstances' is defined by statute as

'exceptional circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien.'") Petitioner's App. 2a.

The court then applied these correctly stated principles of law to determine that "exceptional circumstances" exist where the alien inadvertently misses a hearing at which the alien's application for adjustment of status *must be granted* because the alien is "the beneficiary of an approved visa petition." See Petitioner's App. 3a (emphasis added).

The INS contends that the court mistakenly concluded that it had conceded at oral argument that Singh would not have been ordered deported at the hearing. Petitioner's App. 10, fn. 2. Whether the INS made such a concession is irrelevant because it is clear that, under BIA precedent, the IJ would have had no choice but to grant Singh's petition. See *Socop-Gonzalez*, 272 F.3d at 1197 ("had Socop filed a motion to reopen to seek readjustment of status, the BIA could only have granted his motion if he also

submitted an approved visa petition"), citing *In re Arthur*, 20 I & N Dec. 475 (1992). Because the court presumed that Singh's application would have been granted based on his approved visa petition, its decision is limited to that situation.

The court also correctly pointed out that, in evaluating whether exceptional circumstances exist, it must look to all "the particularized facts presented in each case." Petitioner's App. 4a; *Singh v. INS*, 213 F.3d 1050, 1052 (9th Cir. 2000). It then applied that correct principle of law by considering the facts here, including that the alien simply had no reason to skip the hearing that would have been the triumphant conclusion of his efforts to obtain the legal right to remain in this country with his wife and child. Petitioner's App. 4a.

Finally, the court agreed with the Seventh Circuit that the INS should not deny reopening of an *in absentia* deportation order "where the denial leads to the unconscionable result of *deporting an individual eligible for relief from deportation.*" Petitioner's App. 5a, citing *Chowdhury v. Ashcroft*,

241 F.3d 848, 853 (7th Cir. 2001) (emphasis added). In applying the rule stated in *Chowdhury*, the court here noted that Chowdhury was also the recipient of an approved visa application, and that he could not be deported without either breaking up his family or requiring U.S. citizens to move to India. See Petitioner's App. 5a. Those are the same circumstances as are found here. It is thus no wonder that the court of appeal reasoned that *Chowdhury* mandated the result here.

Because the court of appeal applied the "properly stated rule[s] of law," this Court should not grant the INS's petition for writ of certiorari. See Rules of the Supreme Court, Rule 10.

2. The INS also attempts to bring this case within this Court's requirements for granting certiorari by arguing in essence that the court of appeals "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Rules of the Supreme Court, Rule 10(a); see Petition for Certiorari, 15-16. But that attempt must fail because the asserted

conflict does not exist. The INS attempts to manufacture it by citing only two published cases from other circuits, along with unpublished court of appeals decisions from three other circuits: three from the Fourth Circuit, and one each from the First and Sixth Circuits. Putting aside the unpublished cases, the two published cases are not in conflict. In *Ursachi v. INS*, 296 F.2d 592 (7th Cir. 2002), the question was whether the alien had met his evidentiary burden of establishing his serious illness; the court held that he had not. But unlike the case here and in *Chowdhury*, 241 F.3d 848, 853, the alien had not received an approved visa petition. Nothing in the record suggested that he would have received an adjustment of status. Likewise, in *de Morales v. INS*, 116 F.3d 145, 148-149 (5th Cir. 1997), the aliens had no asylum or other claims for relief pending when their car broke down, causing them to miss the hearing. Thus, these cases have no bearing on how the BIA should decide when, as here, the alien has an approved visa petition.

Because the court of appeals' decision is not

"in conflict with the decision of another United States court of appeals on the same important matter," this Court should not grant the INS's petition. See Rules of the Supreme Court, Rule 10(a).

3. Finally, the INS asks this court to recoil in horror at the burden this decision will supposedly place on the INS in being forced to hold thousands of hearings on petitions to reopen *in absentia* deportation orders. Petition for Writ of Certiorari, 16-18. But the INS misconstrues the scope of the court's decision here. In no way can it be read to mandate "detailed consideration of the merits of the underlying deportation case and the alien's application(s) for relief from deportation" in all cases of motions to reopen. Petition for Certiorari, 17. Rather, the court's language must be read in light of the unusual facts of Singh's case: (1) his immediate-relative visa petition had been approved; and (2) he was married to a United States citizen. Respondent's App., 1A, Petitioner's App. 2a-3a. As the court carefully noted, under those circumstances,

Singh would not have been deported at the hearing. See *Socop Gonzalez*, 272 F.3d at 1197, citing *In re Arthur*, 20 I & N Dec. 475 (1992). Thus, the decision is limited to circumstances where, on the face of the record, the BIA would have no choice but to grant a petition for adjustment of status. There is thus no need for the INS to hold a mini-hearing to decide whether it would have granted an application in its discretion.

Conclusion

The Ninth Circuit Court of Appeals' decision correctly stated the legal principles it applied in this case, and correctly applied them under the narrow circumstances here. Its decision is not in conflict with that of any other United States court of appeals on this issue; and it will not lead to a rash of aliens attempting to circumvent *in absentia* deportation orders. This decision's sole effect is to allow an immigrant with an approved visa petition to remain in this country with his U.S. citizen wife and child.

This Court should therefore deny the INS's

petition for a writ of certiorari.

Respectfully submitted,

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May 2003

APPENDIX

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1. U.S. Department of Justice, Immigration and Naturalization Service, Approval Notice, dated December 7, 1993 ..... A1

U.S. Department of Justice

Immigration and Naturalization Service

Notice of Action

Applicant/Petitioner A #

A 41 808 618

Application/Petition I130

IMMIGRANT PETITION FOR RELATIVE, FIANCE(E), OR ORPHAN

Receipt #		Appliant/Petitioner
WAC-94-02152875		KAUR, HARPREET
Notice Date	Page	Beneficiary A93 172 050
December 7, 1993	1 of 1	SINGH, RANJIT

HARPREET KAUR
1507 E MUNCIE AVE
FRESNO CA 93720

Approval Notice
Class: C21
Priority Date: October 28, 1993
Notice also sent to: None

The above petition has been approved.

We have sent it to the Department of State Immigrant Visa Processing Center (TIVPC), Suite 700, 1401 Wilson Blvd, Arlington, VA 22209

This completes all INS action on this petition. The Department of State Immigrant Visa Processing Center will communicate shortly with the person the petition is for concerning further immigrant visa processing steps.

Please read the back of this form carefully for more information.

You will be notified separately about any other applications or petitions you filed. Save this notice. Please enclose a copy of it if you write to us about this case, or if you file another application based on this decision. Our address is:

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